IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 118 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

AHER PARBAT PUNJABHAI

Versus

STATE OF GUJARAT

Appearance:
MR KJ SHETHNA for Petitioners
Mr.Y.F.Mehta, LAPP for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 10/12/96

ORAL JUDGEMENT (N.J.Pandya,J.)

This appeal was taken up along with Criminal Revision Application No.133 of 1989, but the Revision Application came to be rejected on 5-12-1989. What surviving is only the Criminal Appeal filed by the 3 convict of Sessions Case No.114/88 of the Court of

Addl.Sessions Judge, Junagadh.

2. In all 9 accused were facing trial under that Sessions Case for an incident which happened on 3rd June 1988. At about 12.30 or 1.00 p.m., the incident happened. The complainant was at his shop, where he was selling Bidi and other miscellaneous articles. The deceased Hardasbhai Rajabhai came there to purchase bidi and talked with him for about 5 to 10 minutes. As he was going back from the shop and when he hardly reached a stone platform in the centre of the village chowk where Ramji Mandir is situate,from one side of the chowk came accused no.8 and gradually other accused also came there. They were having sticks. So far as accused no.8 is concerned, he had spear in his hand.

3. The accused assaulted the deceased and soon complainant and others came on the scene and tried to intervene and in the process received injuries. However, so far as the deceased, a man aged about 75 years is concerned, he received two blows on his head, one according to the prosecution witnesses, by spear given by accused no.8 and the other with a stick on his right upper arm. He fell down and soon became unconscious. He was carried in a taxi to Municipal Hospital at Veraval which is nearby, as the incident took place in village Panakva, Malia taluka. Both the Doctors found that internal head injuries were there and therefore, the patient was referred to a Neoro Surgeon at Ahmedabad. However, he died before he could be carried and post mortem examination was performed. It revealed fatal injuries leading to bleeding and damage to brain material. Externally also, there was swelling on the forehead part and fracture of frontal bone and right perietal bone. Being unconscious, there is no question of his having stated anything with regard to the incident.

4. The complaint came to be lodged at 6.45 p.m. at Veraval Municipal Hosptial where it was taken by the duty Head Constable and through police station it was forwarded to Malia Hatina Police Station within whose area the incident happened.

5. In the aforesaid background, the main accused came to be chargesheeted and the trial Court framed charge as per Exh.1 for offences under Sections 141, 143,147,149, 302,323, 337 as well as for offence under Bombay Police Act, Sec.37(1) read with Sec.135 and whereever necessary, Sec.149 was pressed into service.

6. In the trial Court, the case has been fought at both the sides meticulously and 13 prosecution witnesses were examined and panchnama, postmortem notes, report of the Forensic Science Laboratory etc. were produced in course thereof. The defence also has examined witnesses. Doctor is also examined as an Expert Witness. At the end of the trial, by judgment dated 18-1-1989, the learned trial Court Judge was pleased to acquit accused no.1 and 4 to 7 and 9. Accused no.2 came to be convicted for offence under Sec.323 Indian Penal Code and the remaining two for offence under Sec.302 and 323. Accused no.2 was awarded sentence for one year and fine of Rs.1000/-. The remaining two accused, appellants no.2 & 3 were awarded life imprisonment for offence under Sec.302 and R.I.for 1 year and fine of Rs.1,000/- for offence under Sec.323.

7. Learned Advocate Mr.Shethna, appearing for all the three accused, has very strenuously urged that the case of the prosecution, as led before the trial Court, is not worthy of acceptance and therefore, the appeal should be allowed in toto. He attacked the prosecution on all counts and particularly with regard to the main incident itself. The prominent feature that he brought about was that, if at all there be any evidence as to motive, it related to women folk of both sides, but the deceased himself was in no way concerned with it. He may be related to the prosecution witnesses, but it was the wife of the complainant and accused no.8 who had quarrel on the previous evening. The place of incident was a drought prone area and they were passing through one of the drought period and therefore, water being scarce, such skirmish does happen in the rural area. On the previous day, the wife of the complainant was standing ahead of the wife of accused no.8 in the queue. That woman preceded the wife of the complainant and secured water for herself. This led to the quarrel.

8. The acquittal of the other accused and the finding of the learned Judge clearly indicate that the prosecution has failed to establish the common object of unlawful assembly. Once the common object is taken away and so far as the background of the incident as to quarrel relating to water is borne in mind, it is obvious that if at all there be any premeditated plan to attack somebody from the prosecution witnesses' side, the target could not have been the deceased. Therefore, in the prosecution case, the intention part has considerably weaken.

9. The second limb of argument on behalf of the appellants was that looking to the panchnama of the scene

of incident Exh.39, and three photographs Exh.25, they indicate that at the place where the incident occurred, there were stones lying on the ground as well as on the stone platform and also on the ankle made by joining two platforms there were protruding stones having their rough surface. At that junction point, the position of stones was such as to make a sort of stair case of 3 steps. The three steps were of rough lime stones. The submission onbehalf of the appellants, therefore, before the trial Court and before us was that the old man had fallen down on this rough surface and his head had come in contact with the rough stone surface and suffered injureis and therefore, the charge of murder or even lesser charge of culpable homicide not amounting to murder cannot be brought home to any of the accused. However, the occular evidence as well as medical evidence is clearly to the effect that the injuries have been caused by agency other than a fall and that injury is directly attributable to appellants no.2 & 3 respectively with stick and spear. Stick blow has been given on the perietal side of the head and the spear blow edgewise has been given on the top of the head in the valtex area and at both places there was depressed fracture causing intracranial haemorrhage and also damage to brain materials. The skull had fractured into 3 to 4 pieces. Looking to the site of the injury, the same could have been casued by a spear. The attempt on the part of the defence to explain away that it could be a fall on a rough stone surface in our opinion, would not succeed. That fall not only should have been with great force but should have been so angled as to bring the valtex of the head of the deceased directly in contact with the rough and protruding part of stony surface and that in our opinion, would be too far fetched a story to accept.

10. Looking to the age of the deceased, brittle fracture on account of a fall cannot be ruled out, but when the location of the injury along with the medical as well as occular evidence on record is taken into consideration ,the learned trial Court Judge has rightly rejected the attempt on the part of the defence to explain away the same by a fall on a rough stone surface and we also do the same.

11. In the alternative, L.A. Mr.Shethna has strongly urged that if the deceased was not the target and he had nothing to do with the previous day's incident and when the common object part of the prosecution case has failed ,could it be said that death of the deceased was intended by either of the appellants no.1 & 2? No doubt, knowledge has to be attributed to them of the result of

the deed done by them namely stick blow on forehead and spear blow edgewise on the valtex and therefore, according to Mr.Shethna, the case would fall under Sec.304 and not under Sec.302. He further submitted that the case would be covered by Sec.304 Part II and not Part I.

12. Learned APP Mr.Y.F.Mehta resisted this attempt on the part of the appellants and tried to point out from the evidence on record that the motive part of the prosecution case is established. However, when the submission is based on other material on record and accepting the motive part without conceding the case, in our opinon, the objection raised on behalf of the State cannot be accepted. It is a fact that the motive part is only obliquely referred to in course of only one witness, who has tried to attribute a sentence as to motitve to a witness who has not been examined. Once that sentence as to motive attributed to an unexamined witness is declared out of consideration, the fact remains that what is sought to be passed off as a motive was merely a quarrel amongst women about collection of daily water supply on the previous day. It is nobody's case that the deceased was in any way involved in it.

13. It has come on record, so far as the prosecution witnesses are concerned that they too have received injury which remained unexplained. This would indicate that there was a scuffle between two groups which again will rule out the possibility of a premeditated action to do away with the deceased. In the process of the scuffle if injury came to be inflicted upon the deceased , it would not be intentional though the knowledge has to be attributed to the author of the injury as to its effect.

14. Under the circumstances, we accept the alternative submission made by L.A. Mr.Shethna and come to the conclusion that the case is covered not by Sec.302, but by Section 304 part II so far as appellants no.2 & 3 are concerned. They have been arrested on or about 4th June 1988 and ever since then, they remained undertrial priosoners and thereafter, have been undergoing sentence from the date of conviction. From the order of the learned Judge, it is also found that accused nos.2 & 3 have been convicted for offence under Sec.323, I.P.C. as well. For this we do not find any material on record and in any case when they have been convicted for a larger offence, no separate sentence for this smaller offence is warranted and the appeal in that regard is accepted.

15.(i) The net result, therefore, is that the appeal is partly allowed. The order of conviction under Sec.302 of Indian Penal Code, so far as appellants nos.2 & 3 are concerned, is set aside and in its place, appellants no. 2 & 3 are convicted for offence under Sec.304 Part II. With regard to sentence, whatever sentence, they have already undergone is held to be sufficient and they are ordered to be set at liberty forthwith, if not required for any other purpose. The order of conviction and sentence under Sec.323 and fine of Rs.1000/- so far as appellants no.2 & 3 are concerned, is set aside.

(ii) Conviction of accused-appellant no.1 is confirmed. He remained in jail on that score. However, with regard to sentence, there is room for modification. He has already paid a fine of Rs.1000/-. He remained in jail from 4-6-1988 to 1-7-1988 and thereafter, has remained on bail all through out. The sentence that he has undergone by remaining in jail for the aforesaid period is held to be sufficient and with this modification, the appeal qua him is also partly allowed. His bail bond stands cancelled. Appellants no.2 & 3 are presently placed at Amreli Open Jail and writ should be sent to that Jail.

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